IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 8, 2004 Session

STATE OF TENNESSEE v. DAVID LAMAR HAYES

Direct Appeal from the Circuit Court for Rutherford County
No. F-48895 Don R. Ash, Judge

No. M2002-01331-CCA-R3-CD - Filed August 9, 2004

A Rutherford County jury convicted the defendant of thirteen counts of rape of a child and seven counts of rape, for which he received an effective 220-year sentence. He raises the following issues on appeal: (1) whether the evidence is sufficient to sustain his convictions; and (2) whether the trial court erred in imposing sentence. We affirm the convictions with the exception of one count of rape, which count is reversed and dismissed. We further reduce the effective sentence and remand for entry of amended judgments reflecting an effective sentence of sixty-six years.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part; Reversed and Dismissed in Part; Remanded for Entry of Amended Judgments

JOE G. RILEY, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Gerald L. Melton, District Public Defender (on appeal); and Gregory M. Galloway, Nashville, Tennessee (at trial), for the appellant, David Lamar Hayes.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and J. Paul Newman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant lived with the victim's mother and the victim for approximately six years. The victim, D.J.,[1] was twelve years old when the defendant began performing the sexual acts which underlie his convictions. Her date of birth was July 20, 1986. The following facts appear in the context of the counts to which they relate.

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[1] It is the policy of this court to identify minor victims of sex crimes by their initials.

Count One

D.J. testified that one morning during the week of January 4-8, 1999, after her mother had gone to work, the defendant awakened her and directed her to "tiptoe" out of her room, undress, and lie beside him on the bed. The defendant penetrated her vagina with his penis. The victim testified she cried and was afraid. She told the defendant, "It hurts," to which he responded, "Be quiet."

Count Two

During the week of January 11-15, 1999, under similar circumstances, the defendant again had sexual intercourse with D.J.

Counts Three through Twelve

D.J.'s testimony reveals the details of the specific occurrences were, with rare exceptions, identical. The victim testified the defendant instigated sexual intercourse with her twice each month during February, March, April, May, and June 1999. In March 1999, the defendant told D.J. that he would kill her if she told anyone what was happening.

Count Thirteen

In July 1999, the victim traveled to Las Vegas with her brother and mother. Her return from this vacation fell on her thirteenth birthday, July 20, 1999. She recounted one occurrence of sexual penetration by the defendant on July 8 or 9 prior to the trip; thus, she was under thirteen years of age at that time.[2]

Count Fifteen

D.J. described another instance of sexual penetration by the defendant approximately one week after her return from Las Vegas; thus, she was thirteen years of age at that time.

Counts Sixteen through Nineteen

D.J. testified that in August and September 1999, the defendant penetrated her sexually twice during each of these months.

Count Twenty

D.J. testified that on October 29, 1999, a friend visited her at her house. The defendant told her friend to stay inside the house, and "he had me to go out into the garage in his car. And he told

[2]Count fourteen alleged the offense of child rape, but was dismissed at the request of the state.

me to have sex with him in the car." She testified they then had sexual intercourse. She further testified this was the last time she had sexual intercourse with the defendant.

Additional Testimony at Trial

D.J. testified there was never a time when she agreed to what the defendant did to her. She stated that on no occasion did she give her consent. The victim testified that when she told the defendant she had missed her period, he told her she should "act like [she] was messing around with another boy."

On January 1, 2000, D.J. was with her mother in Alabama visiting with extended family. She testified that she told her mother what had happened at that time, "[b]ecause I was with my family and I knew [the defendant] couldn't do anything." D.J. testified her mother immediately telephoned her natural father; she and her family traveled back to Tennessee; and D.J. was taken to the hospital to be examined. After determining that D.J. was pregnant, the decision was made to travel to Kansas in order to have an abortion.

Dr. Maureen Sanger testified that on January 1, 2000, she was contacted by the emergency room at Nashville General Hospital regarding alleged sexual abuse of D.J. and concerns about her pregnancy. Sanger, a psychologist, recalled counseling the victim concerning her pregnancy, specifically with regard to the likelihood that an abortion would be precluded due to the advanced stage of the victim's pregnancy. Sanger testified her records indicated the victim's date of birth, as provided by her parents, was July 20, 1986.

D.J.'s mother, father and step-mother testified the victim was born on July 20, 1986. The victim's birth certificate indicated the victim was born on July 20, 1986, and was admitted into evidence.

Detective David Loftis, of the LaVergne Police Department, testified he traveled to Kansas at the time D.J. received her abortion in order to gather DNA material from the fetus. Deanna Lankford, a forensic laboratory supervisor for Life Codes, testified about the analysis of the fetal DNA in comparison to the DNA obtained from the defendant. She testified that a comparison of the defendant's DNA with the DNA obtained from the aborted fetus of the victim indicated a "99.99997 percent probability . . . that he is the father of that child."

The defendant testified he lived with D.J.'s mother, D.J., and another sibling for approximately six years. The defendant admitted to having sexual intercourse with the victim beginning in "June-June-June or July-It was July," 1999. He denied having sexual relations before she turned thirteen years old. He insisted his sexual relationship with D.J. was always consensual. When asked if he ever threatened D.J., the defendant testified he "could never harm her." The defendant testified, "The way [D.J.] explained it was wrong and it was one hundred percent a lie. She lied, her mother lied, all of them lied." The defendant further stated, "And the birth certificate is a lie."

I. SUFFICIENCY OF THE EVIDENCE

The defendant challenges the sufficiency of the evidence to support his convictions, arguing: (1) the victim's testimony was so lacking in credibility and/or indicia of trustworthiness that no reasonable trier of fact could have found him guilty beyond a reasonable doubt; and (2) the victim consented to sexual intercourse and her testimony is uncorroborated accomplice testimony. We disagree with the defendant's assertions.

A. Standard of Review

When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Brewer, 932 S.W.2d 1, 18 (Tenn. Crim. App. 1996).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the state the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Elkins, 102 S.W.3d 578, 581 (Tenn. 2003).

The trier of fact, not this court, resolves questions concerning the credibility of the witnesses, the weight and value to be given the evidence as well as all factual issues raised by the evidence. *Id.* In State v. Grace, the Tennessee Supreme Court stated, "[a] guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." 493 S.W.2d 474, 476 (Tenn. 1973).

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

B. Analysis

The defendant complains that the victim's testimony lacks credibility, and that no reasonable juror could have found him guilty of the offenses. Specifically, the defendant argues the victim's testimony was "robotic" and lacked "indicia of truthfulness" due to its repetitive, non-specific nature. The defendant admits he had sexual relations with the victim beginning after the victim's thirteenth birthday. However, he asserts the novel argument that the victim's greater specificity regarding the

July occurrences, coupled with the defendant's own denial of previous occurrences, indicates the victim's fabrication of the pre-July offenses.

Tennessee Code Annotated section 39-15-522(a) defines rape of a child as "the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tennessee Code Annotated section 39-13-503(a) defines rape, in relevant part, as the "unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances: . . . (2) the sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent. . . ."

As noted above, the credibility of a witness's testimony is an issue for the finder of fact. Viewing the evidence in the light most favorable to the state, the victim testified with specificity regarding the first two counts of sexual penetration by the defendant. Subsequent counts were alleged either with greater specificity, or were identified as similar in pertinent detail to the earlier described events. The victim denied consenting to penetration by the defendant on any occasion.

Testimony that the victim was not yet thirteen years old at the time counts one through thirteen took place was offered by the victim, the victim's mother, and the victim's step-father. The defendant claimed, "[the victim] lied, her mother lied, all of them lied." The jury rejected that claim. As an appellate court, we may not revisit that issue.

With respect to counts one through thirteen and fifteen through twenty, we conclude the defendant has failed to meet the burden of illustrating why the evidence is insufficient to support his convictions. We conclude the evidence adduced at trial was sufficient to support the jury's verdict of guilt beyond a reasonable doubt for those counts.[3]

C. Count Twenty-One

Count twenty-one of the indictment, the last count, alleges the commission of rape in "October, 1999." The victim's testimony only described one incident of sexual intercourse in October 1999, and that incident formed the basis of the conviction under count twenty. The victim testified this was the last time they had sexual intercourse. Thus, the guilty verdict as to Count 21 is not supported by the evidence. The rape conviction under count twenty-one is reversed and dismissed.

[3] We have examined the record to determine whether plain error exists with regard to election of offenses, although the issue is not raised by the defendant. *See* State v. Walton, 958 S.W.2d 724, 727 (Tenn. 1997). We note that both the jury charge and final arguments are absent from the record. Based upon the record before us, we discern no plain error.

D. Accomplice Corroboration

While the defendant does not deny he had sexual intercourse with the victim after she was thirteen years of age, he contends she always consented to sexual relations. The defendant claims that in view of her alleged consent, the victim should be considered an accomplice with the attendant requirement of corroborating testimony.

In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice. State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001); State v. Allen, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). The question of who determines whether a witness is an accomplice depends upon the evidence introduced during the course of a trial. Bethany v. State, 565 S.W.2d 900, 903 (Tenn. Crim. App. 1978). When the undisputed evidence clearly establishes the witness is an accomplice as a matter of law, the trial court, not the jury, must decide this issue. State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990). On the other hand, if the evidence adduced at trial is unclear, conflicts, or subject to different inferences, the jury, as the trier of fact, is to decide if the witness is an accomplice. *Id.* If the jury so finds, the issue of whether the witness's testimony has been sufficiently corroborated becomes a matter entrusted to the jury as the trier of fact. State v. Bigbee, 885 S.W.2d 797, 804 (Tenn. 1994).

The Tennessee legislature has determined that victims of sexual penetration or sexual contact under the age of thirteen may not be considered accomplices:

> If the alleged victim of a sexual penetration or sexual contact within the meaning of § 39-13-501 is less than thirteen (13) years of age, such victim shall, regardless of consent, not be considered to be an accomplice . . . and no corroboration of such alleged victim's testimony shall be required to secure a conviction if corroboration is necessary solely because the alleged victim consented.

Tenn. Code Ann. § 40-17-121. Thus, as to counts one through thirteen, the victim could not be an accomplice to child rape. No corroboration of her testimony was required. Furthermore, the victim testified she never consented to sexual intercourse. Thus, the jury could certainly conclude she was not an accomplice.

As to the remaining convictions for simple rape, the victim could not be an accomplice. One of the requirements of rape, as applicable to this case, is that it must be "without the consent of the victim." *See* Tenn. Code Ann. § 39-13-503(a)(2). A victim of a rape based upon lack of consent cannot be an accomplice, who must knowingly and voluntarily unite with the principal offender in committing the offense. In short, a rape victim, by definition, can not be an accomplice to the rapist. This issue lacks merit.

II. SENTENCING

The defendant challenges his effective 220-year sentence. He contends the trial court erred: (1) by failing to consider applicable law, sentencing principles, and mitigating factors; and (2) by imposition of consecutive sentences.

A. Standard of Review

A defendant's sentence is reviewed by the appellate courts *de novo* with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d); State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). For this presumption to apply to the trial court's actions, there must be an affirmative showing in the record that the trial court considered sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the trial court does not comply with statutory sentencing provisions, our review of the sentence is *de novo* with no presumption the trial court's determinations were correct. State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000).

B. The Sentencing Hearing

The victim's father testified that since the rapes occurred, the victim had experienced memory loss and difficulty concentrating. He stated the victim has trouble sleeping, is shy around males and generally withdrawn. He testified the victim underwent counseling with a therapist for a period of nine months. The victim's mother testified the victim has been shy, scared and distant as a result of the rapes.

The trial court applied the following enhancement factors to all offenses: enhancement factor (8), "[t]he offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement," and enhancement factor (16), "[t]he defendant abused a position of public or private trust." *See* Tenn. Code Ann. § 40-35-114(8), (16) (2003). The trial court declined to apply any mitigating factors. The trial court sentenced the defendant to twenty-two years for each child rape conviction and eight years for each rape conviction.

The trial court found consecutive sentencing was appropriate under Tennessee Code Annotated section 40-35-115(a)(4) (dangerous offender) and (a)(5) (sexual offender). The trial court ran the sentences for the first ten counts of child rape consecutively for a total of 220 years, ran the sentences for the other three child rape convictions consecutively to each other but concurrently with the first ten counts, and ran the sentences for all of the rape convictions consecutively to each other but concurrently with the first ten counts of child rape. As a result, the trial court imposed an effective sentence of 220 years.

C. Length of Each Sentence

The defendant does not contest the application of enhancement factor (16). The defendant does contend, however, the trial court misapplied enhancement factor (8), pleasure or excitement.[4] *See* Tenn. Code Ann. § 40-35-114(8) (2003). Enhancement factor (8) requires an examination of the defendant's motive for committing the offense. State v. Kissinger, 922 S.W.2d 482, 490 (Tenn. 1996). In rape cases, the state may prove the defendant's motivation to seek pleasure or excitement through evidence of "sexually explicit remarks and overt sexual displays made by the defendant . . . or remarks or behavior demonstrating the defendant's enjoyment of the sheer violence of the rape." State v.Arnett, 49 S.W.3d 250, 262 (Tenn. 2001).

We conclude the trial court properly applied enhancement factor (8) to the defendant's convictions. The defendant testified the acts of sexual intercourse were always consensual, and the evidence does not suggest that the acts were simply expressions of aggression unrelated to sexual fulfillment. Thus, the clear inference is that the defendant committed the acts for sexual pleasure. This argument is without merit.

The defendant maintains the trial court erred in failing to apply mitigating factor (1), "[t]he defendant's criminal conduct neither caused nor threatened serious bodily injury"; mitigating factor (8), "[t]he defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense[s]"; mitigating factor (11), "[t]he defendant . . . committed the offense[s] under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct"; and mitigating factor (13), "[a]ny other factor consistent with the purposes of this chapter." *See* Tenn. Code Ann. § 40-35-113(1), (8), (11), (13).

The trial court properly refused to apply mitigating factor (1) due to evidence that the defendant impregnated the thirteen-year-old victim necessitating a late term abortion. The application of mitigating factor (8) was not warranted as no evidence was presented suggesting the defendant suffered from a mental condition which related to his criminal conduct. The trial court did not err in declining to apply mitigating factor (11) as the proof established the defendant repeatedly engaged in sexual intercourse with the young victim for a period of ten months.

The defendant submits the application of mitigating factor (13) is proper because the victim did not suffer significant residual damage and he had no prior criminal convictions.[5] However, the evidence established that the thirteen-year-old victim had an abortion and that she had undergone

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[4]The defendant further contends the trial court misapplied enhancement factor (11), high risk to human life. However, the record does not show that the trial court applied enhancement factor (11).

[5]The presentence report indicates a prior arrest for domestic assault, but no disposition is shown. It also reflects the defendant had pending charges of rape of a child, aggravated assault, evading arrest, and resisting arrest. The report also shows that while the defendant was in the United States Army, he was charged with "indecent exposure and indecent acts upon a child." He was administratively discharged from the United States Army prior to court martial proceedings. The record does not reveal any convictions relating to any of these charges.

counseling. We recognize that the lack of a prior criminal history may be a mitigating factor. *See* State v. Gutierrez, 5 S.W.3d 641, 646-47 (Tenn. 1999). Regardless, we conclude this does not warrant a reduction in the defendant's sentences.

The applicable range of punishment for child rape, a Class A felony, is fifteen to twenty-five years, and in sentencing the defendant, the presumptive sentence is the midpoint of twenty years. *See* Tenn. Code Ann. §§ 40-35-112(a)(1), -210(c). We conclude the trial court properly imposed a twenty-two year sentence for each child rape conviction based upon the applicable enhancement factors. The applicable range of punishment for rape, a Class B felony, is eight to twelve years. *See id.* § 40-35-112(a)(2). The trial court sentenced the defendant to the minimum sentence of eight years for each conviction. The defendant is not entitled to relief on this issue.

D. Consecutive Sentencing

The defendant contends the trial court erred in imposing consecutive sentences without first making a finding on the record that the aggregate sentence was reasonably related to the severity of the offenses or that consecutive sentences were necessary to protect the public. We conclude the aggregate effective sentence of 220 years is excessive.

Generally, it is within the discretion of the trial court to impose consecutive sentences if it finds by a preponderance of the evidence that at least one of following statutory criteria apply:

> (4) [t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; . . . [or]
> (5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims. . . .

Tenn. Code Ann. § 40-35-115(b).

Specific findings that an extended sentence is necessary to protect society and is reasonably related to the severity of the offenses are prerequisites to consecutive sentencing under the "dangerous offender" category in Tennessee Code Annotated section 40-35-115(b)(4). State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). However, such specific factual findings are not required for the other categories of Tennessee Code Annotated section 40-35-115(b). State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). Nevertheless, the general principles of sentencing require that the length of sentence be "justly deserved in relation to the seriousness of the offense" and "be no greater

than that deserved for the offense committed." State v. Imfeld, 70 S.W.3d 698, 708 (Tenn. 2002) (citing Tenn. Code Ann. §§ 40-35-102(1) and -103(2)).

The trial court applied section 40-35-115(b)(5) relating to sexual offenses in imposing consecutive sentences. The defendant concedes the applicability of this section, and we agree it was properly applied.

The trial court also found the defendant was a "dangerous offender" who had little regard for human life and no hesitation about committing an offense which had a high risk to human life. Tenn. Code Ann. § 40-35-115(b)(4). As horrid as these offenses were, we must agree with the defendant that the evidence simply does not support a finding of little regard to human life. Nevertheless, subsection (b)(5) alone authorizes consecutive sentencing. *See* State v. Alder, 71 S.W.3d 299, 307 (Tenn. Crim. App. 2001).

Having concluded the trial court was authorized to impose consecutive sentences, we now examine the aggregate length of the sentences. As noted, the aggregate length must be "justly deserved in relation to the seriousness of the offense" and "be no greater than that deserved for the offense committed." Imfeld, 70 S.W.3d at 708. In addition, the sentence "should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(4); State v. Desirey, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995). Furthermore, we must "assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal laws and its sanctions." Tenn. Code Ann. § 40-35-102(2).

The trial court found that consecutive sentencing was necessary to "protect the public from further criminal conduct and also based upon the severity of the offenses." The trial court also stated the defendant "needs to go to jail for as long as possible." The trial court then imposed the aggregate sentence of 220 years.

This court has previously reversed the imposition of consecutive sentencing for child rape convictions and modified the effective sentence "in relation to the severity of the offenses" and to reflect the "least severe measures necessary to deter the defendant's future criminal conduct, to protect society, and to deter others who are similarly situated and may be likely to commit similar offenses." State v. James M. Powers, E2001-02363-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 889, at *16 (Tenn. Crim. App. Oct. 23, 2002) (concluding the trial court erred in applying (b)(5) to impose consecutive sentencing resulting in an effective sixty-year sentence when the defendant was convicted of four counts of child rape for performing oral sex on his eleven-year-old cousin on multiple occasions within weeks of one another), *perm. to app. denied* (Tenn. 2003). However, unlike James M. Powers, the defendant concedes, and we agree, that (b)(5) applies. Therefore, we now examine the aggregate effective sentences in cases in which the appellate courts have addressed the imposition of consecutive sentencing when (b)(5) was properly applied.

This court has often upheld consecutive sentencing with lengthy terms of incarceration relating to convictions for multiple sexual offenses. *See, e.g.,* State v. Ricky Lamont Brigman, No. M2002-00461-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 538, at *27 (Tenn. Crim. App. June 17, 2003) (relying upon (b)(5) in upholding consecutive sentencing based upon thirteen convictions for various sexual offenses involving six minor victims over a seven-year span resulting in an effective sentence of ninety-one years), *perm. to app. denied* (Tenn. 2003); State v. William Douglas Zukowski, No. M2001-02184-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 62, at *58 (Tenn. Crim. App. Jan. 31, 2003) (holding consecutive sentencing was proper based upon (b)(5) for five convictions of rape of a child resulting in an effective sentence of 125 years where the offenses involved a mentally handicapped victim and the abuse occurred for two years), *perm. to app. denied* (Tenn. 2003); State v. Ann Marie Thorton Kelly, No. M2001-01054-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 1038, at **69-70 (Tenn. Crim. App. Dec. 5, 2002) (upholding consecutive sentencing based upon (b)(5) resulting in an effective sixty-two-year sentence where the defendant was convicted of eight sexual offenses involving her four children for a period of less than one year); State v. Joseph E. Suggs, No. M1999-02136-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 799, at **8-10 (Tenn. Crim. App. Oct. 4, 2000) (holding consecutive sentencing resulting in an effective seventy-five-year sentence was proper based upon (b)(5) where the defendant was indicted for fourteen sexual offenses and pled guilty to three counts of child rape of his minor cousin occurring over an unknown period of time), *perm. to app. denied* (Tenn. 2001); State v. Delbert Lee Harris, No. M1999-01239-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 496, at **10-13 (Tenn. Crim. App. June 23, 2000) (concluding consecutive sentences proper based upon (b)(5) and (b)(6) resulting in an effective thirty-two-year sentence where the defendant was convicted of three sexual offenses and aggravated assault with the sexual offenses involving one minor victim and three separate incidents), *perm. to app. denied* (Tenn. 1999); State v. Frank Crittenden, No. M1998-00485-CCA-R3-CD, 1999 Tenn. Crim. App. LEXIS 1262, at **9-10 (Tenn. Crim. App. Dec. 17, 1999) (upholding consecutive sentencing based upon (b)(5) resulting in an effective sentence of 100 years where the defendant was indicted on thirty-six counts of sexual abuse and pled guilty to eight counts of aggravated rape of his minor daughter occurring over a period of approximately eight years), *perm. to app. denied* (Tenn. 2000).

Based upon our examination of the record and in no way attempting to minimize these despicable crimes, we conclude the aggregate length of 220 years is "greater than that deserved," *see* Imfeld, 70 S.W.3d at 708; does not reflect "the least severe measure" necessary to achieve the purposes of sentencing, *see* Tenn. Code Ann. § 40-35-103(4); and reflects unjustified disparity in sentencing, *see id.* § 40-35-102(2). In reaching this conclusion, we recognize that the effective length of a sentence is not erroneous simply because it extends beyond the expected life of the defendant. *See* State v. Robinson, 930 S.W.2d 78, 85 (Tenn. Crim. App. 1995) (affirming two consecutive life without parole sentences, noting the defendant is not entitled to a "free murder"). A defendant should not escape the full impact of punishment simply because the offenses carry severe punishment. *Id.* We further recognize that the length of a sentence should not necessarily be limited based upon the age of the defendant. *See* State v. Timothy Clayton Thompson, No. E2002-01710-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 697, at *15 (Tenn. Crim. App. Aug. 12, 2003) (affirming consecutive sentencing even though "there is a good possibility that he will not live

to see his release from prison"). On the other hand, the aggregate length of the sentence must be based upon the general sentencing principles. Otherwise, our courts would be authorized to impose consecutive sentences of any effective length without limitation.

All child rape convictions must be served at 100% with no sentence reduction credits. *See id.* § 39-13-523(b). We note the defendant was thirty-seven years of age at the time of sentencing and had no prior criminal convictions. The time span of the offenses was ten months; the victim was the same in each offense; and the defendant resided with the victim and her mother for the preceding five years without any sexual abuse.

Ordinarily this court does not reduce an effective sentence when consecutive sentencing is justified. In most instances, it is well within the discretion of the trial court to determine which sentences should run consecutively. However, we believe this particular effective sentence of 220 years far exceeds that allowed under our general sentencing principles.

Based upon the above, we modify the concurrent/consecutive nature of the sentences as follows: (1) the twenty-two-year sentences for child rape under counts 1, 2, and 13 shall run consecutively to each other; and (2) all other child rape and simple rape sentences shall run concurrently with counts 1, 2, and 13, for an effective sentence of sixty-six years at 100%. Although we realize the effective sentence will in all probability exceed the lifetime of the defendant, we believe an effective sixty-six-year sentence is justly deserved and no greater than that deserved for these offenses. We further believe it is the least severe measure necessary to accomplish sentencing objectives and eliminates unjustified disparity in sentencing.

III. CONCLUSION

Upon our review of the record, we affirm the convictions on all counts except count 21, which is reversed and dismissed. We further affirm the length of each sentence; however, we remand for entry of amended judgments reflecting an aggregate effective sentence of sixty-six years at 100% in accordance with the preceding paragraph.

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JOE G. RILEY, JUDGE